Suing the BVerfG

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Delivered just 4 days before the 70th anniversary of the Schuman declaration, the 5 May 2020 ruling of the German Bundesverfassungsgericht (BVerfG) – declaring illegal the quantitative easing program of the European Central Bank (ECB) and nullifying a prior judgment of the European Court of Justice (ECJ) – has sent shockwaves through the EU constitutional system. However, the judgement has also triggered strong responses. On the same day, the ECB firmly replied that its action had already been upheld by the ECJ, which it obeys. On 8 May 2020, the ECJ in a terse press release reminded the public that it has the sole power to strike down EU acts, and that the supremacy of EU law is the only way to guarantee the equality of the member states in the union they created – a position confirmed also by one of the Presidents of the Bundesgerichthof in a highly critical commentary of the judgment of its fellow German judges. And on 10 May 2020, the European Commission President Ursula von der Leyen backed up the ECJ statement and announced that its services were evaluating the option to start infringement proceedings.

In fact, it is the argument of this blog that the Commission must activate the procedure of Article 258 TFEU and sue (Germany for the grave breach of EU law by) the BVerfG. As I maintain, this action is constitutionally necessary, legally sound, and it may ultimately help achieve an important integration function – neutralizing the minefield that the BVerfG built around the future of Europe.

Following the BVerfG judgment, an infringement proceeding is the minimum the European Commission can do preserve the legal order as created by the EU treaties, of which it is the guardian ex Article 17 TEU. Indeed, disobedience against prior judgments of the ECJ is not unprecedented. In 2012 the Cezch Constitutional Court set aside the ECJ ruling in *Landtova*, and in 2016 the Danish Supreme Court refused to abide by the ECJ ruling in *Ajos*. However, those cases were pretty specific. They related to secondary legislation. And they were also admittedly delivered by member states which are at the margin of the EU core, being inter alia outside the Eurozone. On the contrary, the BVerfG ruling targeted the monetary policy of the ECB, which is exclusive competence of the EU. It facially called into question the principle of the supremacy of EU law. And it was delivered by an influential institution – which is looked at as a model worldwide – in the largest and economically more powerful member state of the EU. Commission President Ursula von der Leyen, a German herself, is therefore rightly keen to make sure this is not taken lightly.

At the same time, an infringement proceeding would be legally well grounded in the circumstances. EU law has long recognized the responsibility of member states for breaches of EU law resulting from action by its highest judicial authorities. In the leading case *Köbler v. Austria*, of 2003, the ECJ found Austria in breach of

EU law due to the failure by its highest administrative court to give due regard to EU law in one of its rulings. In fact, failure to give regard to EU law by the highest national courts also led to infringement proceedings in *Commission v. Italy*. This 2011 judgment culminated a complex judicial saga, which had been originated by the failure by the Italian Court of Cassation to abide by EU state aid rules. In *Traghetti del Mediterraneo* the ECJ held that national legislation excluding the responsibility of the state for breaches of EU law caused by its top courts was incompatible with EU law, and given the failure by Italy to comply with that judgment the Commission started infringement proceedings, which resulted in another ECJ ruling in 2011: this held that by excluding all liability for damage caused to individuals through an infringement of EU law on the part of a court adjudicating at last instance Italy had breached its treaty obligations. As such, going after the BVerfG for its 5 May judgment would surely be not unprecedented.

Of course, an infringement action would not be taken against the BVerfG itself – but rather against the Federal Republic of Germany. Article 258 TFEU proceedings are levied against member states –which for the purposes of this action are seen as unitary actors. Practically, then, the task of defending the state in the front of the ECJ would fall to the Bundesregierung. This may sound a little unfair, considering that the German Federal Government has done little wrong here. In fact, prominent members of the parliamentary majority that leads Germany – including the Chairman of the Bundestag Foreign Affairs Committee Norbert Röttgen, and, albeit with many nuances, also the President of the Bundestag Wolfgang Schäuble, have criticized the ruling of the BVerfG.

And yet, here is precisely where the role of an infringement proceeding can become particularly valuable from the long-term prospects of European integration. For it has become clear that the BVerfG is now an obstacle to further steps towards ever closer union and that the German political elite is unable to overcome this form of judicial aggrandizement *without a little external help*.

On the one hand – since the early 1990s and increasingly in the last decade– the BVerfG has raised its voice in its rulings on EU matters and built a battery of constraints on further EU integration. Through its Maastricht Urteil, the Lissabon Urteil and the judgments on the composition of the EP, the ESM Treaty and the ECB action among others, the BVerfG significantly limited the ability of Germany to participate in the EU, and conversely on the EU to move forward. Yet, this anti-European jurisprudence of the BVerfG is built on thin air. In particular, the judge-made reading that the Basic Law's right to vote clause can be interpreted as an open-ended, catch-all enablement to review EU legislation is as insult to the post-war founders of the Republic, which nowhere set state sovereignty as an obstacle to the development of an EU in which Germany participates as an equal partner. In fact, the BVerfG stance is surely not justified in light of the constitutional history of the German state – which, inter alia, only regained its full sovereignty in 1990.

On the other hand – despite this situation that many regarded as annoying – the German political class has not mustered the courage to rein in an overbearing BVerfG, which is highly regarded among the populace. And so there has been no political leadership to bring back the BVerfG to where it institutionally belongs – as

an organ that should review the action of German public authorities for compliance with the German basic law, no less no more.

The infringement proceeding de quo, however, could become a crucial asset in the effort to break domestic paralysis and trigger internal change. If the Commission were to bring the case, as it is hoped, and if the ECJ were to approve it, as it is likely, then the German Federal Government would be under an EU (and international) obligation to implement the ruling, *changing its domestic law*. And this would require addressing face-on the arbitrary power that the BVerfG has claimed for itself. Indeed, this is also the lesson of the abovementioned *Commission v. Italy* case. While – for historical reasons connected to the post-Mani Pulite clash between judges and politicians in Italy– the Italian Parliament had been unable to amend the 1988 law on the liability of judges to include cases of damages for breaches of EU law, the ECJ judgment in the Commission infringement proceeding gave coverage to legislation that, in 2015, eventually amended domestic law to introduce a claim of liability of judges for breaches of EU law. In a similar vein, an infringement proceeding against Germany could give legal coverage to take domestic remedial action against the BVerfG. And incidentally it would also mark the difference from what the Hungarian and Polish governments are doing: while the latter are reducing national judicial power *against EU law*, here German authorities would reduce the powers of the BVerfG *in execution of EU law*.

To achieve this objective, changes to German legislation would not suffice. Likely the implementation of an adverse ECJ ruling would require the German Government and Parliament to amend the Basic Law. But the *Tanja Kreil* case is a living proof that Germany already had to amend its Basic Law to comply with an adverse ruling of the ECJ – in casu holding that the prohibition for women to serve in the army then set in Article 12 was in breach of the EU gender equality directive. This could give the opportunity to spell out in German constitutional law that the powers of the BVerfG do not extend to challenging the validity of EU law in Germany. In fact, the model Germany could look at is the Irish Constitution, which at Article 29(4)(6) – as last modified – states that "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State […] that are necessitated by the obligations of membership of the European Union […] or prevents laws enacted, acts done or measures adopted by (i) the said European Union […] or institutions thereof […] from having the force of law in the State." This clause, which is a comparative example of best practice, could neutralize the minefield planted by the BVerfG, giving constitutional protection to the EU and its laws within the German legal system.

In sum, the BVerfG pronouncement on 5 May 2020 has created a dynamic outside its control. The strong reactions to the ruling, and the indications by the European Commission that it may start infringement proceedings signaled that the BVerfG cannot expect to get away easily for what it did. In fact, as I have argued, the Commission must start infringement proceedings, and has a strong legal case to do so. Moreover, "suing the BVerfG" may actually prove crucial to embolden the German democratic branches of government to take measures to contain the overreach of the BVerfG. If an infringement proceeding were to result – as it most

certainly would – into an ECJ judgment ruling Germany in breach of EU law, state authorities could implement that judgment by constitutionalizing in the Basic Law the supreme principle that EU law is not subject to BVerfG review for as long as Germany remains a member of a union it so fundamentally helped create

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